In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-263

HILLIS B. AKIN AND JOHN W. MILLIGAN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Tried before a jury in the United States District Court for the Southern District of Iowa on eighteen counts of mail fraud, 18 U.S.C. 1341, petitioner Akin was found guilty on all counts and petitioner Milligan on fourteen. Akin was sentenced to five years' imprisonment on each count, to run concurrently, and fined $10,000. Milligan was sentenced to four years' imprisonment on each count, to run concurrently. The

fraud involved the sale of live chinchilla breeding stock and equipment. The court of appeals affirmed (Pet. App. A).

Petitioners raise precisely the same contentions rejected below—namely, that the indictment was improperly based on hearsay evidence; that the government produced an expert witness at trial without previously disclosing that it intended to do so; and that the government failed to provide the defense with exculpatory evidence (the names of some of petitioners' customers who said they were satisfied). Each of these contentions is adequately answered by the court below on whose opinion we principally rely. In addition to the case cited by the court below in rejecting the argument that the government's failure to disclose its expert witness denied petitioners a fair trial, see also *United States* v. *Saitta*, 443 F. 2d 830, 831 (C.A. 5), certiorari denied, 404 U.S. 938; *Hemphill* v. *United States*, 392 F. 2d 45, 48 (C.A. 8), certiorari denied, 393 U.S. 877; *Meyer* v. *United States*, 396 F. 2d 279, 283 (C.A. 8), certiorari denied *sub nom. Dugger* v. *United States*, 393 U.S. 1017; *United States* v. *Cole*, 453 F. 2d 902 (C.A. 8). We further note that this Court denied certiorari in *Hansen*, 393 U.S. 833, cited by the court below (Pet. App. A-3).

We point out in addition that petitioners' reliance (Pet. 7) on *United States* v. *Bryant*, 439 F. 2d 642 (C.A. D.C.), is misplaced. In *Bryant* the court of appeals was concerned with the intentional non-preservation by investigative officials of tape recordings of

statements by the *defendants*. In that case, however, the court pointed out that Rule 16, Fed. R. Crim. P., does not authorize discovery or inspection of statements made by government witnesses or prospective witnesses (other than the defendant) except as provided by 18 U.S.C. 3500. 439 F. 2d at 649.

Nor is such a disclosure required by due process where, as here, the witnesses or prospective witnesses are known to both parties. *United States* v. *Gleason*, 265 F. Supp. 880, 884 (S.D. N.Y.); *Levin* v. *Katzenbach*, 363 F. 2d 287, 291, n. 11 (C.A. D.C.). Of the five individuals who allegedly made exculpatory statements, one testified for petitioners, another two testified for the government and the remaining two, who were called as witnesses by the government but did not testify, were employees of petitioners (Tr. Vol. III 621, Vol. IV 881, 966, Vol. V 1335, 1336; Affidavit of Robert Hamman and Howard VanderZyl attached to petitioners' motion for new trial).[1]

It is therefore respectfully submitted that the petion for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1972.

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[1] "Tr." refers to the six-volume trial transcript which we are lodging with the Clerk. We are also lodging with the Clerk a copy of petitioners' motion for a new trial.

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